No. 93-1048

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In The

Supreme Court of the United States

October Term, 1993

J. WESLEY COOPER, MARGARET COOPER and JAMES CARTER,

Petitioners,

vs.

THE ARMSTRONG RUBBER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do the Federal Rules of Evidence allow a district court to exclude expert testimony on grounds that the opinion lacked a reliable foundation?

II. In an action to recover response costs, does CERCLA require a plaintiff to present proof that a release or threatened release of a hazardous substance by a defendant caused the plaintiff to incur the costs?

III. Under Mississippi law, is a market stigma a compensable damage absent a confirmed physical property damage or a confirmed threat of physical property damage?

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STATUTES INVOLVED

The following statutes and rules are involved in the present case and set forth in the appendices; 42 U.S.C. §§ 9601(9), 9601(14), 9607(a); Fed. R. Evid. 702, 703.

STATEMENT OF THE CASE

The Respondent, Armstrong Rubber Company ("Armstrong")[1] manufactured tires at its Natchez, Mississippi plant from 1939 until 1987. Until the early 1970s, Armstrong disposed of plant wastes, principally, at a rural location known as the "Cain site." Armstrong's waste stream consisted of reject tires, packing crates, sweepings from the plant floor and other common industrial wastes. (R. Vol. 2, p. 1010). A relatively small portion of Armstrong's waste stream consisted of liquids containing hazardous wastes in trace amounts. These liquids were often burned on site. (R. Vol. 10, p. 4077).

Because of the hilly terrain and highly erodible soil in the Natchez area, landowners requested Armstrong to dispose of its wastes on their properties to assist them in filling and reclaiming gullies and ravines. Petitioner James Carter was one of those landowners. His property, known as the "Carter" site and an adjoining piece of property called the "Batieste" site were disposal sites also at issue in this case. (R. Vol. 2, p. 1002).

The Mississippi Bureau of Pollution Control ("BPC") began its investigation of the Cain site in November 1986. This investigation expanded to the Carter and Batieste sites. Armstrong was ordered to remove drummed wastes from the Batieste site and to conduct testing at all three sites.

Independent testing of the three sites was conducted by the BPC and the United States Environmental Protection Agency ("EPA"). The BPC concluded that, according to the data collected, "there is no imminent threat to human health at these sites." (R. Vol.

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1. Pursuant to Supreme Court Rules 24.1(b) and 29.1, Armstrong states that Armstrong has since sold its assets to Condere Corporation and its stock to Pirelli Enterprises Corporation.

1, p. 0045).[2] The BPC tested the drinking water wells of area landowners, including that of petitioner J. Wesley Cooper ("Cooper"). Chemicals found in the water were within naturally occurring background levels. (R. Vol. 6, P. 2207). The EPA agreed: "In summary, this data review does not indicate that a public health threat exists from the use and consumption of area groundwater." (R. Vol. 1, p. 0051).

During this investigation by Armstrong and the regulators, the petitioners, in September 1988, filed this lawsuit alleging that wastes at the three sites caused them personal injury and property damage. Cooper maintained that his stomach cancer was caused by contamination which reached the groundwater below the disposal sites, flowed to and polluted his well water. The nearest disposal site to the Cooper property is the Cain site, two-thirds of a mile away. The petitioners also sought recovery for "response costs," under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and for property damage under Mississippi common law.

After discovery ended in early 1991, Armstrong filed a motion for summary judgment. By that time, the EPA, BPC and even Cooper's own toxicologist and medical doctor agreed that the extensive testing done at the site established that the groundwater beneath the waste sites flowed away from, instead of toward, Cooper's well. Testing also revealed that the groundwater was not contaminated. The investigations had determined that in order for the waste sites to have a causal connection to Cooper's stomach cancer, (a) the contaminants on the surface of the sites would have to work their way through 100-150 feet of soil and into the

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2. The petitioners mistate that the three sites met "superfund category status." Petition at 4. BPC did not determine that the three sites were "superfund" sites deserving federal funds for a cleanup. BPC only stated that the sites should be studied using superfund standards. (R. Vol. 9, p. 3455).

subsurface groundwater (b) and then the contaminants would have to defy gravity and travel 3500 feet uphill, against the natural water flow, to his private well. (R. Vol. 6, p. 2189). Cooper's defense to summary judgment depended on the opinion of geologist Dr. Nolan Augenbaugh that this aquifer could have reversed direction, sending contaminated groundwater uphill to the Cooper well.[3]

The district court rejected Augenbaugh's testimony as inadmissible because it had no basis in fact; instead, his opinion, that groundwater had reversed direction and that the groundwater was polluted, had no factual support and was based solely on speculation. Likewise, the district court dismissed the petitioners' CERCLA claim finding that "chemicals at the site do not pose an imminent hazard to human health." The petitioners' property damage claims were dismissed because the only "damage" was purported stigma which had allegedly depressed the properties' value. The Fifth Circuit affirmed.

SUMMARY OF THE ARGUMENT

Cooper's personal injury claim is wholly dependent on the expert testimony of Dr. Augenbaugh. Without Dr. Augenbaugh's testimony, the petitioners have no proof that Armstrong's wastes contaminated Cooper's well-water. Cooper was the only plaintiff who pursued a personal injury claim through the summary judgment stage of the case.

The district court properly ruled Dr. Augenbaugh's testimony inadmissible because his opinions lacked a reliable foundation. In

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3. The petitioners refer to their toxicologist, Dr. William George, who opined that wastes from the Cain, Carter and Batieste sites had reached the groundwater beneath those sites and flowed to and contaminated the Cooper well. Petition at 8-9 n.1. The district court recognized that Dr. George's opinion was dependent on Dr. Augenbaugh's flow reversal theory.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), this Court preserved the district court's duty to screen out expert testimony which lacks a reliable basis. If the expert seeks to impart scientific knowledge to the jury, the proposed testimony must be founded on scientific method.

This Court should deny the petition for writ of certiorari because although this case was decided by the Fifth Circuit and district court before *Daubert*, the ruling on Dr. Augenbaugh's testimony is consistent with Rule 702 of the Federal Rules of Evidence, as interpreted in *Daubert*. Expert opinions lacking a reliable foundation are inadmissible under *Daubert*.

Dr. Augenbaugh sought to opine that (a) the groundwater beneath the disposal sites was contaminated and (b) this groundwater had reversed its normal direction of flow, moved toward and contaminated Cooper's well. Dr. Augenbaugh performed no site specific study of his own. He merely second guessed work and conclusions of other experts. His opinions were based on speculation and were properly excluded.

CERCLA allows a private party to recover costs incurred in "response" to a release or threatened release of a hazardous substance. Cooper is the only petitioner who presented proof of purported response costs.

Because many hazardous substances are naturally occurring, the detection of a hazardous substance on property, of itself, is insufficient to justify a private party's incurrence of costs of response. The hazardous substance must be present in a concentration exceeding some applicable and relevant federal or state standard. If such a concentration does not exist, the private party cannot successfully claim that he or she has been caused to incur response costs. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989).

The petitioners claim that the Fifth Circuit modified *Amoco* in this case, thereby placing the Fifth Circuit in conflict with other circuits. The case was decided on an interpretation of CERCLA consistent with the other circuits. Both the district court and the Fifth Circuit reviewed the record and determined that the disposal sites where Cooper incurred costs posed no threat of release onto Cooper's property over two-thirds of a mile away. Cooper's property was never used as a disposal site by Armstrong. The petitioners have no admissible proof to establish that Armstrong caused hazardous substances to be released into the Cooper water well.

Finally, the petitioners were unable to establish any physical property damage or threat of physical property damage sustained by their properties. In response to Armstrong's motion for summary judgment, the petitioners presented the testimony of real estate appraiser Douglas Upchurch. Mr. Upchurch testified that a "stigma" was attached to the petitioners' properties because of the perception that the properties were polluted. The district court properly dismissed the petitioners' property damage claims because Mississippi law does not recognize market stigma as a compensable property damage.

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL RULES OF EVIDENCE ALLOW A DISTRICT COURT JUDGE TO EXCLUDE EXPERT TESTIMONY IF THE OPINION LACKS RELIABLE FOUNDATION.

The petitioners present their case as an opportunity for the Court to strike down what the petitioners regard as the Fifth Circuit's "result-oriented reinterpretation of the federal rules of civil procedure and the federal rules of evidence." Petition at 16.

According to the petitioners, the "underpinnings" of the Fifth Circuit's prejudice against toxic tort cases were erased by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). However, both the district court and the Fifth Circuit founded their exclusion of expert testimony on a legal and factual basis consistent with *Daubert*.

A. Daubert Recognizes The Trial Court's Duty To Ensure That An Expert's Opinion Has A Reliable Basis.

Fundamentally, *Daubert* deems the *Frye* test superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 113 S. Ct. at 2793. Under *Frye*, "the thing from which the [expert's] deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This Court, in *Daubert*, removed "general acceptance" of the expert's technique as a necessary prerequisite to the admissibility of the expert's opinion. *Daubert*, 113 S. Ct. at 2794.

Daubert does not, however, eliminate the trial judge's authority and duty to screen expert opinions: "To the contrary, under the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*." *Id.* at 2795 (emphasis added).

Daubert reads Rule 702 to require that the "knowledge" a scientist seeks to impart to the jury be based on more than conjecture.

> The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. . . . [I]n order to qualify as 'scientific knowledge,' an inference or

> assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation — *i.e.*, 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.

Daubert, 113 S. Ct. at 2795 (quoting Fed. R. Evid. 702).

Here, as the district court noted, Cooper's toxicologist, Dr. William George, and medical doctor, Dr. Lawrence Miller, conceded that the suspect chemicals could not have caused Cooper's cancer unless they were in the drinking water at concentrations significantly exceeding background levels. (A26 - 27).[4] Dr. George went further by acknowledging that the chemical concentrations in Cooper's well water were insufficient to have caused his cancer. (A27). Nevertheless, Dr. Miller opined that the causal link existed because the requisite concentrations existed from 1950 through the 1970s. Dr. Miller assumed that these concentrations existed because Dr. Nolan Augenbaugh, Cooper's geologist, had so opined. (A27).

The district court, consistent with *Daubert's* reading of Rule 702, ruled Dr. Augenbaugh's testimony inadmissible because it was not founded on scientific methodology; it was based on speculation. Dr. Augenbaugh's opinion was founded on only a cursory review of studies performed by Armstrong's consulting engineers. He performed no site specific study of his own, had no facts to support his opinion and he rejected the field data reported in the engineering studies of the site: "Speculation followed by speculation, unlinked to the case-specific facts, should be rejected." (A28).

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4. Reference to the Petitioners' Appendix.

The district court also found that Dr. Augenbaugh speculated that the Natchez aquifer beneath the disposal sites is polluted. (A31). This is a huge assumption because, as stated above, (a) it assumes contaminants have descended through 100-150 feet of soil to reach the aquifer and (b) that this aquifer reversed its natural flow and polluted the Cooper well at sufficient concentrations over a sufficient period of time to cause Cooper's cancer. The district court noted that this was countered by hard scientific data to the contrary. Likewise, Augenbaugh's flow reversal theory was met with geological facts to the contrary. "The court observes that [Augenbaugh's theory] is sheer speculation about the possible, not a study of the data or application of any scientific methodology." (A32). *See also Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 614 (7th Cir. 1993) (Applying *Daubert:* "If experts cannot tie their assessment of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the expert's testimony is not helpful to the jury").

B. The Dissent In *Christophersen* Is Not Prophetic of *Daubert.*

At the time that this case was briefed and argued before the Fifth Circuit, the governing case on the admissibility of expert testimony was *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992). The petitioners complain that the Fifth Circuit committed error by refusing to remand or rehear the case after this court released *Daubert.* This Court noted in *Daubert*, however, that under *Christophersen*, the Fifth Circuit regarded the *Frye* test and the Federal Rules of Evidence as co-existing. *Daubert*, 113 S. Ct. at 2793 n.5. Therefore, since the district court excluded Dr. Augenbaugh's testimony based on an interpretation of the Federal Rules of Evidence consistent with *Daubert* and untainted by *Frye*, this case is not a proper case for the Court to review *Christophersen's* alleged inconsistency with *Daubert*.

The petitioners rely on the *Christophersen* dissent as if it predicted the rule in *Daubert*. Petition at 17. According to the dissent, a district court may not analyze the expert's "methodology." *Christophersen*, 939 F.2d at 1129 (Reavley, C.J., dissenting). This is exactly contrary to the point of *Daubert* that the district court judge has a duty to ensure that the expert's opinion is founded on scientific methodology and not speculation.

II.

IN A CERCLA ACTION TO RECOVER RESPONSE COSTS, THE PLAINTIFF MUST PRESENT PROOF THAT A RELEASE OR THREATENED RELEASE OF A HAZARDOUS SUBSTANCE BY THE DEFENDANT CAUSED THE PLAINTIFF TO INCUR RESPONSE COSTS.

The petitioners urge this Court to grant certiorari to correct the Fifth Circuit's criteria for a *prima facie* CERCLA cost recovery action. According to the petitioners, in this case, the Fifth Circuit stepped out of line with other circuits by modifying the elements set out in *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), to require "that the contaminants be on plaintiffs' property for the site to constitute a facility under [CERCLA]." Petition at 18 (citing A13). In this alleged departure from *Amoco*, according to the petitioners, the Fifth Circuit now requires "that response costs, to be recoverable, must be incurred in the testing or cleaning of the plaintiffs' property." Petition at 19. The petitioners contend that this supposed amendment to *Amoco* puts the Fifth Circuit at odds with *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146 (1st Cir. 1989), which allows a plaintiff to recover CERCLA response costs even if the plaintiff did not own the land where the contaminants were released. Petition at 19-20.

A. In This Case, The Fifth Circuit Acted Consistent With *Amoco* and *Dedham* By Requiring That The Petitioners Have Proof That A Release Or Threatened Release By Armstrong Caused Them To Incur Response Costs.

The Fifth Circuit's ruling in this case is consistent with *Dedham*. While *Dedham* does not require that the plaintiff's property be contaminated as a prerequisite to CERCLA liability, *Dedham* does require, consistent with *Amoco*, that the release or threatened release of a hazardous substance *caused* the plaintiff to incur response costs. *Dedham*, 889 F.2d at 1153 ("[T]he question is whether the release or the threatened release by a defendant has caused a plaintiff to incur response costs); *Amoco* 889 F.2d at 668 (A CERCLA cost recovery action requires "that the release or threatened release has caused the plaintiff to incur response costs").

In this case, the Fifth Circuit focused on whether the Cain, Carter or Batieste sites posed any threat of contaminating Cooper's property. After reviewing the record, the Fifth Circuit agreed with the district court that there was no evidence that the three sites had contaminated or that they posed an imminent threat to the Cooper property.[5] (A6-8). Because there was no hazardous waste disposal directly on the Cooper property, the Court had to review whether purported wastes from the three sites could be transported to the Cooper property via groundwater. (A8). Consistent with *Daubert*, the Fifth Circuit concluded that Dr. Augenbaugh's opinion, the only possible evidence of this route of transportation of wastes, lacked a scientific foundation, was pure speculation and, therefore, was inadmissible. (A9-11). Since no evidence existed to establish that the three disposal sites posed a threat to pollute Cooper's property, the only remaining way to establish CERCLA liability was for Cooper to establish that the hazardous substances were, in

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5. Cooper is the only plaintiff submitting any proof that he incurred alleged response costs.

fact, on his property, thus making his property a "facility." The Fifth Circuit found that this evidence was also lacking. (A12).

This analysis is consistent with *Dedham*. Dedham Water was a regulated public water utility whose primary water supply was the White Lodge Well Field. The defendant, Cumberland Farms, discharged pollutants which eventually drained into the White Lodge Well Field. *Id.* at 1148. While Dedham Water's property was not contaminated, its water supply source was. Therefore, Dedham Water, by Cumberland Farms' actions, had been caused to incur response costs. *Id.* at 1148, 1152-53. *See Dedham*, 889 F.2d at 1154 n.8 (recognizing that under *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988), "there must be a causal connection between the defendant's conduct and the plaintiff's incurrence of costs") (emphasis original).

Likewise, the present case is inappropriate for the granting of certiorari because its ruling on CERCLA liability is consistent with other circuits. *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993), is particularly significant because of its factual similarity to this case. The plaintiff Water Authority sued Tonolli, the owner of an adjacent lead smelting plant, for response costs under CERCLA. Tonolli established, as did Armstrong in this case, that the plant was "hydrogeologically isolated from the Authority's water production wells so that contamination on the Tonolli property would not migrate to the Authority's water supply." *Id.* at 1216. The Third Circuit determined that the district court's finding of hydrogeological isolation was not clearly erroneous. There being no threat of contamination, the plaintiff was not entitled to future costs that the authority expected it would incur if such a threat existed. *Id.*[6] *See*

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6. The Authority was entitled to recovery of monitoring costs it had already incurred because there was evidence that there was a "reasonable risk" that the Tonolli plant, next to the Authority's property, would contaminate the Authority's property. *Lansford*, 4 F.3d at 1218-19. Here, the record contains no evidence that such a risk ever existed.

also, White v. County of Newberry, 985 F.2d 168, 174 (4th Cir. 1993) (The plaintiffs could not recover under CERCLA because they could not show that the defendant would release the TCE so that it would flow into the plaintiff's well "or that the topography of the surrounding land even would allow drainage to flow from the County's property to the White's well").[7]

B. A Party Has Not Been Caused To Incur Response Costs Unless The Hazardous Substance Is Present In A Concentration Exceeding Some Applicable Federal Or State Standard.

The district court subdivided *Amoco's* fourth element of a *prima facie* CERCLA case into two parts. The plaintiff must submit proof that the hazardous substance found at the site is "(4) in a quantity which exceeds some federal or state standard . . . (6) [and] the presence of the hazardous substance on the site poses an imminent and substantial threat to health or the environment." (A37).

Response costs are recoverable only if the plaintiff has acted to contain a release that threatened the public health or the environment. *Amoco*, 889 F.2d at 669. Many of the suspect substances (arsenic, cadmium, chromium and lead) complained of by petitioners occur naturally in the environment. Thus, as noted in *Amoco*, "[r]emedial actions taken in response to hazardous substances as they occur naturally are specifically excluded from the NCP (National Contingency Plan] and are therefore not recoverable." *Id.* The threshold issue plainly stated is "whether the

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7. The petitioners further argue that *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993) is evidence that the Fifth Circuit is out of line with other circuits on CERCLA law. Petition at 20. In *Bell*, the Fifth Circuit addressed the question of joint and several liability under CERCLA. Joint and several liability is not an issue in this case and, therefore, this case is an inappropriate vehicle for the review of *Bell*.

particular hazard justified any response actions." A response action is only justified where a "legally applicable or relevant and appropriate . . . requirement [ARAR]" has or is threatened to be violated by release. *Id.* at 671.

> We hold that a plaintiff who has incurred response costs meets the liability requirement as a matter of law if it is shown that any release violates, or any threatened release is likely to violate, any applicable state or federal standard, including the most stringent.

Amoco, 889 F.2d at 671.

1. Cooper's Well

Beginning at page 5 of the Petition, the petitioners have reproduced a chart they presented to the Fifth Circuit which purports to show that hazardous substance concentration levels in Mr. Cooper's well currently exceed the drinking water standard or maximum contaminant level (MCL). Closer examination of the record reveals that the chart distorts the truth.

a. Cadmium - The petitioners cite cadmium concentrations of 10 and 20 ppb.[8] The petitioners selected the three oldest samples and two of these samples were at 10 ppb, equal to, but not exqeeding, the MCL for cadmium. In seven subsequent samples, including one sample taken and analyzed by the plaintiffs' chemist, Wilma Subra, cadmium was analyzed for but not detected. (R.Vol. 6, pp. 1979, 1981, 1992).

b. Mercury - Tests by Armstrong's successor, Fidelity

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8. The concentration measurement of ug/l approximately equates to parts per billion (ppb).

Tire Corporation ("Fidelity"), showed high concentrations of mercury in the Cooper well and two other wells on the same date. When these mercury levels were not repeated in subsequent tests, the Mississippi Department of Environmental Quality ("DEQ") concluded that the detection of mercury was lab error. (R. Vol. 8, p. 3132).

c. Selenium - The Cooper well was tested for selenium on nine occasions and concentrations never exceeded the MCL of 50 ppb. (R. Vol. 9, p. 3414).[9]

d. Arsenic - The petitioners' chart reports three samples where arsenic was detected, at 3 ppb, 12.6 ppb and 12 ppb respectively. Each result is well below the MCL of 50 ppb. On eight other occasions, including a test by the petitioners' chemist, Wilma Subra, arsenic was analyzed for and not detected. (R. Vol. 6, pp. 1979, 1981, 1991).

e. Phenol - The petitioners' chart shows phenol detected at 100 ppb and 1.2 ppb. The chart does not report a drinking water standard or MCL for phenol because there is none. (R. Vol. 9, p. 3534). The petitioners had the burden of proving to the district court that phenol exceeds a relevant standard.

f. Benzene - DEQ's first test of Cooper's well showed a very high concentration of benzene (2,480 ppb). DEQ suspected that the high benzene level was caused by lab contamination. Two later tests confirmed that lab error occurred on the first test. The results of the second and third tests were less than the detection limits of 10 ppb and 5 ppb, respectively, meaning that on both

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9. The selenium graph the petitioners cite to is misleading because it appears to show MCL at about 30 ppb. Nevertheless, the only sampling result which appears to exceed 30 ppb is "ND @ 40," meaning that selenium was not detected when a 40 ppb detection limit was used.

occasions, the benzene level was too low to detect. (R.Vol. 8,pp. 3127, 3178).

2. "Cooper Stream"

The petitioners' chart lists testing results on Cemetery Bayou which they have renamed "Cooper Stream" for purposes of their petition. (R.Vol. 6, p. 2016).

The petitioners' chart alleges that the ARAR is located at 40 C.F.R. § 141.32(e) and § 141.63. Neither section provides ARARs for fresh water streams. Part 141 of 40 C.F.R. applies only to public water systems[10] that sell water. 40 C.F.R. § 141.3. There is scant information about Cemetery Bayou in the record. One fact is clear — the bayou is not a public water system governed by the drinking water standards of 40 C.F.R. § 141.

Moreover, the record does not indicate that the sample was taken on or even adjacent to Mr. Cooper's property (Vol. 9, R. 3391); nor does it establish that the chemicals came from an Armstrong disposal site.

3. Carter Soil

The petitioners' chart on page 6 of their petition purports to establish that certain metals in the Carter soil are "above background . . . [and] above EPA standards." The petitioners have not, however, cited to the Court an ARAR for these substances. The section cited, 40 C.F.R. § 261.24, describes toxicity characteristics used by EPA to determine whether a solid waste is a

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10. To meet the definition of a "public water system," the system must provide piped water to the public for human consumption "if such system has at least 15 service connections or regularly serves an average of at least 25 individuals. . . . 40 C.F.R. § 141.2.

hazardous substance. It is not a standard used to determine whether a release requires a cleanup. The correct substance-to-ARAR comparison is as follows:

Substance	Carter Soil Concentration	ARAR[11]
Arsenic	50 ppm[12]	80 ppm
Barium	910 ppm	4,000-6,000 ppm
Cadmium	1.69 ppm	40 ppm
Chromium	134 ppm	400 ppm
Lead	294 ppm	—[13]

On page 7 of their petition, the petitioners' chart avers that acetone is present in the Carter soil. The petitioners do not provide the Court with the citation of a regulatory standard violated by the concentrations cited. The petitioners' chemist Wilma Subra's chart lists acetone at 7.0, 2.3 and 0.49 ppm. (R.Vol. 8, p. 3029). This is well below the RCRA (Resource Conservation & Recovery Act 42, U.S.C. §§ 6901-92) corrective action standard of 8000 ppm. Also on page 7, the petitioners list ethyl benzene as a hazardous substance present in the Carter soil. The Wilma Subra chart referred to lists ethyl benzene at 0.22 and 0.21 ppm. (R.Vol. 8, p. 3009). This, too, is well below the RCRA corrective action standard of 8,000 ppm.

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11. The ARAR for soils is published at 57 Fed. Reg. 30798 (July 27, 1990) [hereinafter "RCRA corrective action standard"].

12. Concentrations reported at mg/kg (for solids) and mg/l (for liquids) approximately equate to parts per million (ppm).

13. There is no RCRA corrective action level for lead in soils. However, the current position on lead held by the EPA Office of Solid Waste and Emergency Response ("OSWER") is to allow soil concentrations of 500-1,000 ppm to remain in place in residential soils at Superfund sites. OSWER Directive No. 9355.4-02 (Sept. 7, 1989) is reprinted in the Appendix at C.

4. Carter Drums

The drums at the Carter-Batieste sites were removed by Armstrong pursuant to a BPC administrative order. (R. Vol. 6, pp. 2025-27; Vol. 6, p. 2015). Originally, BPC assumed that the Batieste site was located on the Carter Property. Even if the petitioners could establish that the Carter drums contained hazardous substances in violative concentrations, there was and is no remedial action left to be taken.

C. An Examination Of Mr. Cooper's Alleged "Response Costs" Of Itself Proves That He Has Not Acted "To Contain A Release Threatening Health Or The Environment."

Even without reviewing a comparison of hazardous substance concentrations to ARARs, it is apparent that Mr. Cooper has not incurred costs "to contain a release threatening the public health or environment."[14] *Amoco*, 889 F.2d at 669-70. Mr. Cooper has not taken the initiative to stop the spread of hazardous chemicals. The activities of his experts were cumulative of the ongoing state and federal site investigations and were performed to support his common-law claims for personal injury and property devaluation, not to protect people or the environment. The BPC began its investigation of the Cain site on November 6, 1986 — two years before the lawsuit was filed. The BPC and EPA concluded that no threat to health or the environment was posed by conditions at Cain, Carter or Batieste. (A7-8).

Nevertheless, Mr. Cooper engaged in second guessing of the regulatory authorities and, ultimately, in the payment of expert fees to attempt to survive summary judgment. These efforts do not

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14. Wesley Cooper is the only petitioner who has presented proof in the record of amounts expended. Mr. Carter has not submitted evidence that he has incurred response costs.

meet the *Amoco* legal standard for a CERCLA cost recovery action.

1. Invoice of Dr. Ralph Pike

Dr. Pike's invoice for $5,475.00 is dated on December 31, 1990, the eve of the plaintiffs' response to Armstrong's motion for summary judgment. The invoice evidences second guessing by Dr. Pike of BPC's evaluation of environmental conditions "near the home of Mr. Wesley Cooper." Dr Pike reviewed documents and prepared an affidavit in response to the motion for summary judgment. (R.Vol. 10, pp, 4015-16). Mr. Cooper, by filing this lawsuit, may have caused himself to incur a liability to Dr. Pike. No environmental hazard justified Mr. Cooper's incurring this liability; rather, any liability to Dr. Pike was the result of Cooper's unsuccessful effort to maintain common-law claims for personal injury and property devaluation. *See Redland Soccer Club v. Department of the Army*, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992) (Fees for expert witnesses are not CERCLA response costs). It is also important to note that there is no evidence in the record that Mr. Cooper has paid Dr. Pike anything.

2. Invoice of Subra Company

The record contains one statement from Wilma Subra for $4,105.00. (R.Vol. 10, pp. 3035). Below is an item by item review of this invoice.

a. August 18, 1987. Subra sampled and analyzed well water which by this time had been tested three times by BPC and once each by Fidelity, EPA and the State Board of Health. BPC found no benzene present on its first retest and EPA concluded from its tests that no contaminants "approach a level of concern" nor do they "indicate that a public health threat exists from the use and consumption of the area groundwater." (R.Vol. 6, pp. 2039-

40). BPC's study of the Carter drums had been ongoing for over eight months and had not yet found a hazard to human health posed by the site. (R.Vol. 6, pp. 2017A, 2039-41).

b. February 12, 1988. Subra analyzed a "split" sample which was also being analyzed by BPC and Fidelity's consultant, Malcolm Pirnie, Inc. (R.Vol. 6, p. 2042).

c. May 31, 1988. Subra sampled and analyzed material from a drum at the Batieste site. At the time of this sampling, Fidelity was already proceeding under an administrative order issued by BPC to investigate Batieste. (R.Vol. 6, p. 2017A).

d. June 28, 1988. Subra sampled and analyzed a water well of Geeva Monk and a drum at Carter. By this time, Fidelity was investigating Carter under a second adminstrative order issued by BPC. (R.Vol. 6, pp. 2044-46).

e. August 29, 1988. Subra sampled and analyzed drums and soil at Carter. At this point, BPC had been investigating Carter for over twenty months (R.Vol. 6, p. 2039), drums had been sampled by BPC twice, the Carter soil had been sampled by both BPC and EPA (R.Vol. 6, pp. 2040-41), Fidelity completed its first investigation of Carter pursuant to a BPC administrative order and was working on the Phase II investigation (R.Vol. 6, pp. 2043-47).

f. September 23, 1988. Subra took more well water samples after 1) the extensive sampling referred to in no. 1, above, and 2) an additional round of well sampling by BPC in August 1988. (R.Vol. 6, p. 2047).

g. September 19, 25, 1989. This effort by Subra consisted of ground water testing and soil borings at the Cain site. At this time, BPC's investigation of Cain had been ongoing for nearly three years. (R.Vol. 6, p. 2039). BPC had tested sediment

and drum samples at Cain in April 1987. EPA had taken a round of samples and had determined there was no health threat posed by the site. (R.Vol. 6, p. 2040). BPC had collected a third round of drum samples (R.Vol. 6, pp. 2040-41). BPC had issued and Fidelity had complied with an administrative order for further investigation of Cain. (R.Vol. 6, pp. 2041-43). As part of its compliance with the first administrative order, Fidelity's consultant had tested and analyzed more drum samples and monitoring well samples. (R.Vol. 6, pp. 2042-43). Fidelity had also conducted further investigation of Cain under administrative orders issued in June 1988 and August 1989. (R,Vol. 6, pp. 2017A, 2044-47).

h. October 16, 1989. On this date, Subra tested two water discharge points at the Armstrong tire plant site. This testing has no apparent link to Cain, Carter or Batieste sites which are several miles away.

A second bill, for $6,940.00, reflects partial payment and covers the "collection and analysis of monitoring wells and water well samples and soil borings" in September 1989. (R.Vol. 10, p. 3036). This bill also contains $2,640.00 in billings dated December 1990, apparently for preparing a response to Armstrong's motion for summary judgment.

D. The Petitioners Were Properly Denied A Declaratory Judgment.

Petitioners assert that CERCLA requires that parties only sustain some response costs to be entitled to a declaratory judgment on liability. Petition at 21. However, declaratory judgments are governed by 28 U.S.C. § 2201 and as explained in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 61 S. Ct. 510 (1941), in order for a case to be justiciable under the Declaratory Judgment Act, it must present "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* 61 S.

Ct. at 512. In this case, after more than five years, petitioners have not removed or remediated anything and have not incurred recognizable response costs. Hence, declaratory judgment on liability was not an appropriate option for the district court.

The cases relied on by the petitioners are not authority for the proposition that merely incurring "some response costs" entitles a private party to declaratory judgment on the issue of liability. In *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983), it was the State of Ohio and not private parties which brought the action to collect costs related to cleaning up a dump from former owners, operators, generators and transporters. As noted by the district court, "the controversy has advanced to a very 'real' level. Ohio alleges that it has already sustained at least $825,000.00 in damages . . . ." *Id.* at 1316. In *Kelly v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989), the State of Michigan and not a private party, brought an action in response to established groundwater contamination. *United States v. Hardage*, 733 F. Supp. 1424 (W.D. Okla. 1989) was an action by the United States which sought partial summary judgment for response costs incurred in cleaning up the Hardage site. The district court found that the United States had incurred $5,441,201.25 of response costs and granted judgment for that amount and, in addition, granted a declaratory judgment for liability for future response costs associated with the site. Moreover, the declaratory judgment in the government's favor was reversed on appeal. *United States v. Hardage*, 982 F.2d 1436 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 300 (1993). *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D.Mass. 1990) was not a CERCLA case but, instead, an action under Massachusetts law by a current landowner against the former landowner who had contaminated the site.

There is no authority for the proposition that costs expended in furtherance of common law tort claims demand that the trial court

grant declaratory judgment adjudicating liability for future CERCLA removal or remediation costs.

III.

UNDER MISSISSIPPI LAW, A MARKET STIGMA IS NOT A COMPENSABLE DAMAGE, ABSENT A CONFIRMED PHYSICAL PROPERTY DAMAGE OR A CONFIRMED THREAT OF PHYSICAL PROPERTY DAMAGE.

The petitioners argue that the district court ignored Mississippi law that "monetary damages include decreased market value caused by the stigma associated with the public discovery that hazardous wastes were placed on the property." Petition at 25. As the district court noted, however, the petitioners' expert discerned that their property values declined because of a *perception* that hazardous wastes were presently on the property, not because proof confirmed that such wastes were present.

Petitioners' real estate expert Douglas Upchurch opined that because of a stigma Cooper's property would be depreciated by 28 to 33 percent of its otherwise fair market value. (R.Vol. 6, p. 2408). As for the Carter property, he opined a fair market value of $50,000 and a zero value due to the stigma associated with the property. (R.Vol. 6, p. 2412). Upchurch's opinions were founded on the erroneous premise that the properties were contaminated and that Mr. Cooper's well was polluted. (R.Vol. 6, pp. 2405, 2410).

In rejecting Upchurch's opinion of damage arising from stigma, the district court determined that under Mississippi law "a market stigma is not a compensable damage absent a confirmed physical property damage or a confirmed threat of physical property damage." (R.Vol. 10, pp. 4147-48) (citing *Dennery v. Hughes*, 214 Miss. 687, 59 So.2d 316 (1952)). In *Dennery*,

plaintiffs sought to enjoin the establishment of a cemetery in the vicinity of their homes. They alleged that the cemetery would cause them to suffer irreparable damage in their property values. The Mississippi Supreme Court refused to regard the cemetery's supposed effect on perceived property values as an actionable harm.

The petitioners attack the district court's stigma ruling contending "that the presence of hazardous substances under a citizen's home, in a citizen's well, or in a citizen's stream" is " 'confirmed physical property damage.' " Petition at 25. As the district court recognized, based on the record, the petitioners have failed to create an issue of fact about stream pollution, well pollution, or hazardous substances under or on petitioners, properties. Case law relied on by the petitioners does not excuse the absence of confirmed physical property damage or interference with the plaintiff's enjoyment of his property. *See City of Jackson v. Filtrol Corp.*, 624 F.2d 1384 (5th Cir. 1980) (PCP from the defendant's plant polluted the plaintiff's lake in sublethal concentrations); *Phillips v. Davis Timber Co.*, 468 So. 2d 72 (Miss. 1985) (PCP from the defendant's wood treatment plant polluted plaintiff's lake); *Bynum v. Mandrel Indus., Inc.*, 241 So.2d 629, 631 (Miss. 1970) (The defendant exploded dynamite on the plaintiff's property, damaging plaintiff's ponds); *Love Petroleum Co. v. Jones*, 205 So.2d 274 (Miss. 1967) (Oil and salt water from the defendant's oil well fed into a creek running across plaintiff's land, killing trees and fish); *Central Oil Co. v. Shows*, 246 Miss. 300, 149 So.2d 306 (1963) (Chemicals from defendant's slush pit escaped onto the surface of plaintiff's property); *City of Oxford v. Spears*, 228 Miss. 433, 87 So.2d 914 (1956) (City discharged raw sewage into a creek running across plaintiff's land); *Edge v. City of Booneville*, 226 Miss. 108, 83 So.2d 801 (1955) (Obnoxious odors and popping noises from the defendant's natural gas reduction station fifty feet away from the plaintiff's property reduced the plaintiff's property value); *Masonite Corp. v. Steede*, 198 Miss.

530, 23 So.2d 756 (1945) (Defendant's plant polluted the river, causing fish kills. Plaintiff's fishery, located on the river, went out of business); *Masonite Corp. v. Dennis*, 175 Miss. 855, 168 So. 613 (1936) (Plaintiff's case was dismissed for lack of evidence).

It follows that the district court's rejection of appraiser Upchurch's opinion and the plaintiffs' claims for property damage based on market stigma was properly sustained by the Fifth Circuit.

CONCLUSION

For the reasons stated, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — FEDERAL STATUTORY PROVISIONS

42 U.S.C. § 9601(9) (1993).

The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(14) (1993).

The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Appendix A

42 U.S.C. § 9607(a) (1993).

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for —

(A) all costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

Appendix A

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

APPENDIX B — FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 703.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

APPENDIX C — OSWER DIRECTIVE # 9355.4-02

PURPOSE

The purpose of this directive is to set forth an interim soil cleanup level for total lead, at 500 to 1000 ppm, which the Office of Emergency and Remedial Response and the Office of Waste Programs Enforcement consider protective for direct contact at residential settings. This range is to be used at both Fund-lead and Enforcement-lead CERCLA sites. Further guidance will be developed after the Agency has developed a verified Cancer Potency Factor and/or a Reference Dose for lead.

BACKGROUND

Lead is commonly found at hazardous waste sites and is a contaminant of concern at approximately one-third of the sites on the National Priorities List (NPL). Applicable or relevant and appropriate requirements (ARARS) are available to provide cleanup levels for lead in air and water but not in soil. The current National Ambient Air Quality Standard for lead is 1.5 ug/m^3. While the existing Maximum Contaminant Level (MCL) for lead is 50 ppb, the Agency has proposed lowering the MCL for lead to 10 ppb at the tap and to 5 ppb at the treatment plant[1]. A Maximum Contaminant Level Goal (MCLG) for lead of zero was proposed in 1988[2]. At the present time, there are no Agency-verified toxicological values (Reference Dose and Cancer Potency Factor, i.e., slope factor), that can be used to perform a risk assessment and to develop protective soil cleanup levels for lead.

Efforts are underway by the Agency to develop a Cancer Potency Factor (CPF) and Reference Dose (RfD), (or similar approach), for lead. Recently, the Science Advisory board strongly suggested that the Human Health Assessment Group (HHAG) of the Office of Research and Development (ORD) develop a CPF for

lead, which was designated by the Agency as a B2 carcinogen in 1988. The HHAG is in the process of selecting studies to derive such a level. The level and documentation package will then be sent to the Agency's Carcinogen Risk Assessment Verification Exercise (CRAVE) workgroup for verification. It is expected that the documentation package will be sent to CRAVE by the end of 1989. The Office of Emergency and Remedial Response, the Office of Waste Programs Enforcement and other Agency programs are working with ORD in conjunction with the Office of Air Quality Planning and Standards (OAQPS) to develop an RfD, (or similar approach), for lead. The Office of Research and Development and OAQRS will develop a level to protect the most sensitive populations, namely young children and pregnant women, and submit a documentation package to the Reference Dose workgroup for verification. It is anticipated that the documentation package will be available for review by the fall of 1989.

IMPLEMENTATION

The following guidance is to be implemented for remedial actions until further guidance can be developed based on an agency verified Cancer Potency Factor and/or Reference Dose for lead.

Guidance

This guidance adopts the recomendation contained in the 1985 Centers for Disease Control (CDC) statement on childhood lead poisoning[3] and is to be followed when the current or predicted land use is residential. The CDC recommendation states that "... lead in soil and dust appears to be responsible for blood levels in children increasing above background levels when the ooncentration in the soil or dust exceeds 500 to 1000 ppm." Site-

specific conditions may warrant the use of soil cleanup levels below the 500 ppm level or somewhat above the 1000 ppm level. The administrative record should include background documents on the toxicology of lead and information related to site-specific conditions.

The range of 500 to 1000 ppm refers to levels for total lead, as measured by protocols developed by the Superfund Contract Laboratory Program. Issues have been raised concerning the role that the bioavailability of lead in various chemical forms and particle sizes should pay in assessing the health risks posed by exposure to lead in soil. At this time, the Agency has not developed a position regarding the bioavailability issue and believes that additional information is needed to develop a position. This guidance may be revised as additional information becomes available regarding the bioavailability of lead in soil.

Blood-lead testing should not be used as the sole criterion for evaluating the need for long-term remedial action at sites that do not already have an extensive, long-term blood-lead data base[1].

EFFECTIVE DATE OF THIS GUIDANCE

This interim guidance shall take effect immediately. The guidance does not require that cleanup levels already entered into Records of Decisions, prior to this date, be revised to conform with this guidance.

Appendix C

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1. In one case, a biokinetic uptake model developed by the Office of Air Quality Planning and Standards was used for a site-specific risk assessment. This approach was reviewed and approved by Headquarters for use at the site, based on the adequacy of data (due to continuing CDC studies conducted over many years). These data included all children's blood-lead levels collected over a period of several years, as well as family socio-economic status, dietary conditions, conditions of homes and extensive environmental lead data, also collected over several years. This amount of data allowed the Agency to use the model without a need for extensive default values. Use of the model thus allowed a more precise calculation of the level of cleanup needed to reduce risk to children based on the amount of contamination from all other sources, and the effect of contamination levels on blood-lead levels of children.

REFERENCES

1. 53 FR 31516, August 18, 1988.

2. 53 FR 31521, August 18, 1988.

3. Preventing Lead Poisoning in Young Children, January 1985, U.S. Department of Health and Human Services, Centers for Disease Control, 99-2230.